



UNIVERSITY OF
TORONTO
FACULTY OF LAW



Law 718H1S

Intensive Course:
Legal Theory and the
Common Law Tradition

February 2009

Prof. A.W. Brian Simpson

VOLUME 1

BORA LASKIN LAW LIBRARY



3 1761 06109140 1

BORA LASKIN LAW LIBRARY

JAN - 8 2009

FACULTY OF LAW
UNIVERSITY OF TORONTO



Law 718HIS

Intensive Course:
Legal Theory and the
Common Law Tradition

February 2009

Prof. A.W.Brian Simpson

VOLUME 1



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

<https://archive.org/details/legaltheorycommo01simp>

Table of Contents

Syllabus	1
I. The World of The Blood Feud and the Rise of the communal Courts	12
1. Law of Ethelbert, in Attenborough, <i>The Laws of the Earliest English Kings</i> (Cambridge, 1922) pg 4-17	15
2. A.W.B. Simpson, "The Laws of Ethelbert" from Arnold et al eds., <i>On the Law and Customs of England: Essays in Honor of Samuel E. Thorne</i> (Univ North Carolina Press, 1981) pg 3-17	23
3. The Communal Courts, Ordeals, and Battle, in Plucknett, <i>A Concise History of the Common Law</i> (Little, Brown & Co, 1956) pg. 83--94, 113-119	31
4. Appeals of Felony	42
5. Law and Customs in Early Britain, in Baker, <i>An Introduction to English Legal History</i> , 4 th ed. (Butterworth's, 2002) pg. 1-10	43
II. A New Kind of Law	50
2. The Assize of Clarendon	51
3. Extracts from Glanvill	54
4. Extracts from AWB Simpson, <i>Invitation to Law</i>	59
5. Trial by Battle, <i>Le Heyr v. Robert Son of Philip</i> (1224)	65
6. Trial by the Grand Assize, <i>Bolbec v. Tureville</i> (1212)	65
7. An Assize of Novel Disseisin at Norwich (1209), <i>Lefwin v. John</i>	66
8. Trial on Indictment by Ordeal (1208), <i>R. v. Staikewater</i>	66
9. Abolition of the Ordeal, Canon 18 of the Fourth Lateran Council (1215)	67
10. English Response to the Abolition of the Ordeal, from T.F.T. Pluncknett, <i>A Concise History of the common Law</i> (Little, Brown & Co, 1956) pg 118-121, 125-131	68
11. The Continental Response, from J.H. Langbein, <i>Torture and the Law of Proof</i> (Univ of Chicago Press, 1977) pg 4-8, 74-76	75
III. The Rival System: The Rediscovery of Roman Law	81
1. AWB Simpson, Common Law Tradition; An unpublished draft chapter	82
2. Extracts from Justinian's <i>Digest</i> Book XVIII	117
3. Extracts from J.H. Merryman, <i>The Civil Law Tradition</i> 2 nd ed.	120
4. Extract on Roman jurists from J.P. Dawson, <i>The Oracles of the Law</i> , (Univ of MI	

	Law, 1968) pg. 107-119	125
5.	“The Boundaries of English Law: from J.H. Baker, <i>An Introduction to English Legal History</i> 4 th ed. (Butterworth's, 2002) pg. 27-29	132
6.	The Importance of Timing from R.C. van Caenegem, <i>The Birth of the English Common Law</i> , (Cambridge, 1973) pg. 106-109	134
IV.	The Common Law Courts	
1.	Handout	
V.	Common Law Procedure and the Separation of Law & Fact	
1.	Note on Writs and Forms of Action, AWB Simpson	137
2.	Note on Law and Fact, AWB Simpson	141
3.	Special Pleadings, Extracts from <i>Novae Narrations</i>	144
4.	Examples of Special Pleadings	146
5.	Direction to a Jury in 1465	149
6.	A Motion in Arrest of Judgment	150
7.	Tentative Pleading	153
VI.	The Court of Chancery	
1.	Earliest known pictures of Court of Chancery (handout)	
2.	Draft of book chapter, AWB Simpson “The Rivals of the Common Law”. ...	156
3.	Illustrative 15 th Century Chancery case, <i>Godemond v. Plane</i>	196
VII.	Common Law Criminal Trial	
1.	Introduction, AWB Simpson, The Common Law Criminal Trial.	198
2.	Throckmorton's Case (1554)	200
3.	Comments by Sir James Fitzjames Stephen	212
4.	Account of Courts of Criminal Jurisdiction	213
5.	“Pretrial Procedure” Account by Sir Thomas Smith	216
6.	Account of 16 th Century Criminal Trial, Early Modern Trial	217
7.	Verdict and Judgments, Account by J.S. Cockburn	219
8.	“Trials of the Late 17 th & Early 18 th Centuries”, Accounted by J. H. Langbein	220
9.	Jury Deliberation	222
10.	“The Coming of the Lawyers” J. H. Langbein	224
11.	Capital Punishment	238
12.	“A Matter of Timing.” unpublished article by AWB Simpson	247

VIII. The Intellectual World of the Law

1. Note on Sir John Fortescue 258
2. Extracts from Sir John Fortescue, *De Laudibus Legum Anglie*, (Cambridge, 1942)
pgs.20-27;56-65;114-131 259
3. Note on Sir John Spelman's *Reports* 278
4. Extracts from Introduction by J.H. Baker to *The Reports of Sir John Spelman* Vol.
II (Selden Society 1978) 279
5. Extract from David Lemmings, *Gentlemen and Barristers* (Clarendon Press,
1990) 287

IX. The Typical Literature of the Common Law.

1. Note by A.W.B. Simpson on Law Reports 293
2. Preface to *Commentaries or Reports* of Edmund Plowden (1578) 296
3. Prefaces by Sir Edward Coke to Volumes I and III of his *Reports* 301
4. Extracts from C.K. Allen, *Law in the Making* (Oxford 1927) 307
5. Extracts from J.P. Dawson, *The Oracles of the Law* (Univ of MI Law, 1968) . 328
6. "The Study of Cases" from A.W.B. Simpson, *Leading Cases in the Common Law*
(Oxford, 1995) 371

X. Theorizing About the Common Law: 15th to 17th Century and Beyond.

1. Note on Sir Mathew Hale 378
2. Extracts from Sir Mathew Hale's *The History of the Common Law of England*
(1713) 379
3. Article by A.W.B. Simpson, "The Rise and Fall of the Legal Treatise" Ch 12 from
Legal Theory and Legal History (Hambledon Press, 1987) 432
4. A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58.3 Univ Cincinnati Law
Rev 819 (1990) 457

XI. Blackstone and Bentham.

1. Note on Sir William Blackstone 473
2. Extracts from D.J. Boorstin, *The Mysterious Science of the Law* (Harvard U Press,
1941) 475
3. Extracts from W. Blackstone, *Commentaries on the Law of England* (London,
1765-69) 486
4. Extracts from M. Lobban, *The Common Law and English Jurisprudence*
(Clarendon Press, 1991) 500

5.	Note on Jeremy Bentham and “Dog Law”	529
XII. The Classical Common Law.		
1.	Note on Conception of a Classical Common Law	530
2.	A.W.B. Simpson, “Innovation in Nineteenth Century Contract Law” in <i>Legal Theory and Legal History</i> (Hambledon Press, 1987)	531
3.	Extracts from G. Glimore, <i>The Death of Contract</i> (Ohio St Univ, 1995)	548
4.	Extracts from G. Gilmore, <i>The Ages of American Law</i> (Yale U Press, 1977) .	551
5.	Extracts from D. Kennedy, <i>The Rise and Fall of Classical Legal Thought</i> (BeardBooks, 2006)	565
XIII. The Jurisprudence of the 19th and Early 20th Centuries.		
1.	Note on Sir William Markby	608
2.	Extracts from W. Markby's <i>Elements of Law</i> (Oxford 1874)	610
3.	A.W.B. Simpson, Lecture on Sir John Salmond, 38 VUWLR 669 (2007)	627
4.	Extracts from J.W. Salmond, <i>Jurisprudence or the Theory of Law</i> (1907) and <i>First Principles of Jurisprudence</i> (1893)	646
5.	Extracts form J.C. Gray, <i>The Nature and sources of Law</i> (MacMillian, 1938) .	661
6.	O.W. Holmes, “The Path of the Law” from Posner, <i>The Essential Holmes</i> (U Chicago Press, 1978)	686
7.	Roscoe Pound, “Mechanical Jurisprudence” 8 Col L R 605 (1908)	695
8.	Roscoe Pound, “The Call for a Realist Jurisprudence” 44 Harvard Law Review 697 (1931)	705
XIV. Hart and His Critics.		
1.	Note by A.W.B. Simpson on Hart	713
2.	A.W.B. Simpson, “Herbert Hart Elucidated” 104 Mich L R 1437 (2006)	715
3.	Extracts from H.L.A. Hrat, <i>The Concept of Law</i>	738
4.	A.W.B. Simpson, “The Common Law and Legal Theory” Ch 15 in <i>Legal Theory and Legal History</i> (Hambledon Press, 1987)	759
5.	Extract from R. Dworkin, <i>Taking Rights Seriously</i> (Harvard U Press 1978) . .	772
6.	Extract from R. Dworkin, <i>Laws' Empire</i> (Harvard U Press, 1986)	781
7.	Extract from M. Arnheim, <i>Principles of the Common Law</i> (Gerald Duckworth & Co., Ltd, 2004)	783
8.	Extracts from D.J. Galligan, <i>Law in Modern Society</i> (Oxford U Press, 2007) .	789

Legal Theory and the Common Law Tradition.

The common law tradition is one of two major legal traditions evolved in Western Europe. In this course we shall investigate it both from a historical and a philosophical point of view. We will first consider what its leading characteristics are, how they became established, and how they differentiate it from other legal traditions, particularly the civil law tradition. The material will be presented in a way which does not require those who take the course to have previously studied legal history. We shall also investigate briefly how the common law tradition was exported to other parts of the world, and with what results, and consider the extent to which it has now split into a number of distinct subdivisions. We will then consider how legal theorists have accommodated or failed to accommodate the common law tradition into their theories of the nature of law in. So the course will be partly historical and partly jurisprudential in its character.

I. The World of the Blood Feud and the Rise of the Communal Courts.

In this section we shall look briefly at the legal world in England before the invention of the common law. In particular we shall be concerned with the following matters:

- a) the replacement of the blood feud by other mechanisms for maintaining social order.
 - b) the origins of the idea of a distinct Royal law.
 - c) the nature of communal courts.
 - d) the use of battle and ordeals in adjudication.
1. The Laws of Ethelbert, from F. L. Attenborough, *The Laws of the Earliest English Kings* (Camb. 1922) at 4-17.
 2. A.W.B. Simpson, "The Laws of Ethelbert", from M.S. Arnold ed., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, Carolina Press 1981 at 3-17.

3. The Communal Courts, Ordeals, and Battle, from T.F.T. Plucknett, *A Concise History of the Common Law* 5th ed at 83-94 and 113-119.
4. Appeals of Felony
5. Law and Custom in Early Britain, from J. H. Baker, *An Introduction to English Legal History* 4th ed. at 1-10.

II. A New Kind of Law.

In this section we shall look into the nature of Royal law in the time of Henry II. In particular we shall look into the following matters.

- a) the procedural formality of the early common law.
 - b) the professionalization and secularisation of Royal adjudication.
 - c) the early history of the jury in both civil and criminal litigation.
1. Note by AWBS.
 2. The Assize of Clarendon (1166) from D. C. Douglas and G.W. Greenaway, eds., *English Historical Documents*, Vol 2 1042-1189 at 407-410.
 3. Extracts from Glanvill (c.1187), G.D.G. Hall, ed., *The Treatise on the Laws and Customs of England Commonly Called Glanvill*, 1965, at 1-5, 22-23, 167-168.
 4. Extract from A.W.B.S, *Invitation to Law*.
 5. Trial by Battle, *Le Heyr v. Robert Son of Philip* (1224) from J. H. Baker and S.F.C. Milsom, *Sources of English Legal History: Private Law to 1750*, 1986, at 21.
 6. Trial By the Grand Assize, *Bolbec v. Tureville* (1212) from J.H. Baker and S.F.C. Milsom, *Sources of English Legal History: Private Law to 1750*, 1986, at 17.
 7. An Assize of Novel Disseisin at Norwich (1209). *Lefwin v. John* from *Selden Society* Vol 4 Case 4289.

8. Trial on Indictment by Ordeal (1208). *R. v. Staikewitter*. From *Selden Society* Vol. 4 Case 3441.
9. Canon 18 of the Fourth Lateran Council, 1215, from H.J. Schroder, ed., *Disciplinary Decrees of the General Councils*, St. Louis 1937 at 258.
10. The English Response to the Abolition of the Ordeal from T.F.T. Plucknett, *A Concise History of the Common Law* 118-121, 125-131.
11. The Continental Response from J.H. Langbein, *Torture and the Law of Proof*, Chicago, 1977 at 4-8, 74-76.

III. The Rival System: the Rediscovery of Roman Law.

In this section we shall consider the nature of legal traditions and consider briefly the history of the other major Western European legal Tradition. We shall be particularly concerned with the following questions.

- a) the general character of ancient Roman legal thought.
- b) the rediscovery, study and use of the texts of the civil law.
- c) the reasons why English law became established as a rival European legal tradition.

Later in the course in Section XII we will look briefly at one branch of the common law, the law of contract, which was strongly influenced by continental civil law.

1. Unpublished Draft Chapter on Legal Traditions by A.W.B.S.
2. Extracts from Justinian's *Digest* Book XVIII
3. Extracts from J.H. Merryman, *The Civil Law Tradition* 2nd ed. Stanford 1985 Ch.2 6-13.
4. Extract on the Roman jurists from J.P. Dawson, *The Oracles of the Law*, Ann Arbor 1968 at 107-119.
5. "The Boundaries of English Law" from J.H. Baker, *An Introduction to English*

Legal History (4th. Ed.) at 27-29.

6. The Importance of Timing from R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge 1973) at 106-109.

IV. The Common Law Courts.

The common law was evolved out of the adjudicative practices of the Common Law Courts, originally principally in the Court of Common Pleas and the Court of King's Bench. The materials will be confined to three pictures of the Courts of Common Law (King's Bench, Common Pleas and Exchequer) and one of the Court of Chancery; they date from about 1457 and the originals are in the Library of the Middle Temple, having been given to the Inn by Sir Charles Darling. They have been cut out of an *Abridgement of Cases*, the rest of which no longer exists. Copies will be available for the class. We shall in particular be concerned with the following matters.

- a) the evolution and structure of the legal profession.
- b) the multi-judge character of the three courts.
- c) the astonishingly small size of the courts of common law.
- d) the originally distinct roles of the three courts.
- e) the mechanisms whereby the common law was made to operate throughout the realm.

V. Common Law Procedure and the Separation of Law and Fact.

In this section we will consider the relationship between the formal procedural mechanisms evolved in the common law courts and the development of a distinction between issues of fact, to be determined by juries, and issues of law to be determined by the professional judges. In particular we shall be looking into the following matters:

- a) the invention and significance of special pleading.
- b) other mechanisms for distinguishing law from fact.

c) the theoretical nature of the distinction.

1. Note on writs by AWB Simpson.

2. Note by AWB Simpson on Law and Fact.

3. Extracts from *Novae Narrationes* ("The Up to Date Stories") ed. S.F.C. Milsom, *Selden Society* Vol.80 pp.12.

4. Examples of Special Pleading

A case in 1348 from Baker and Milsom, *Sources of English Legal History* p.111.

The Thorns Case (1466) (from Fifoot, *History and Sources of the Common Law* 195).

5. A Direction to a Jury in 1465 (from J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898). [Thayer was a professor at the Harvard law School and a pioneer in the case class system of instruction.]

6. *A Motion in Arrest of Judgement*. Pickering v Thoroughgood (1533). From AWB Simpson, *A History of the Common Law of Contract*.

7. Tentative Pleading. *The Surgeon's Case* (1375).

VI. The Court of Chancery.

In this section we shall consider the origins in the 15th century of a non-common law court associated with the Royal Council which administered a body of doctrine which came to be called equity. We shall be concerned in particular with the following matters.

a) how and why did this distinct court originate?

b) what was the theoretical basis for the activities of the Court of Chancery?

c) how and why did the distinction between law and equity become institutionalized?

1. The earliest known pictures of the Court of Chancery. Copies will be provided.

2. Draft of Book Chapter by A.W.B. Simpson on "The Rivals of the Common

Law".

3. An illustrative 15th. Century Chancery petition in *Godemond v. Plane* (1480-81).

VII. The Common Law Criminal Trial.

Most of the leading features of the common law tradition became established in the medieval period, but the form of the criminal trial, the adversary trial, was a much later development. In this section we shall be particularly concerned to look into the following matters:

- a) what are the characteristics of the adversary trial?
 - b) how does a modern trial differ from a 16th century trial?
 - c) how and why did the character of the trial change?
 - d) capital punishment and the role of the priest in the criminal process; the imperfect secularization of the law?
1. Introduction by AWB Simpson.
 2. *Throckmorton's Case* (1554).
 3. Comments by Sir James Fitzjames Stephen (1829-1894), author of the first history of English criminal law. Stephen was an active law reformer and journalist, who was also a prominent barrister; he ended up as a Judge.
 4. Account of Courts of Criminal Jurisdiction by J. H. Baker, from *Crime in England 1550-1800* (ed. J.S. Cockburn, Princeton, 1977).
 5. "Pretrial Procedure", Account by Sir Thomas Smith, *De Republica Anglorum* (1565) with note by J. S. Cockburn.
 6. Account of 16th century criminal trial by Sir Thomas Smith, *De Republica Anglorum* (1565).
 7. J. S. Cockburn on jury verdicts 1559-1624.

8. "Trials of the Late Seventeenth and Early Eighteenth Century" from J.H. Langbein, "The Criminal Trial before the Lawyers" 45 U. Chicago LR 279-84.
9. "Jury Deliberation" from J. M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton 1986) 395-99.
10. "The Coming of the Lawyers". Further extract from J.H. Langbein as in 8 above.
11. "Capital Punishment, Newgate before the Execution". From L. Radzinowicz, *A History of English Criminal law from 1750*. Vol. I 165-78 (Macmillan, 1948).
12. "A Matter of Timing". Unpublished article by AWB Simpson on the death of Mary Ball (1849).

VIII. The Intellectual World of the Law.

In this section we shall look into the professionalization of the law and the organization and educational system associated with this. In particular we shall be concerned with:

- a) the role and functions of the judiciary.
- b) the Inns of Court and Chancery, and the Serjeant's Inns.
- c) the educational exercises in the Inns and the concept of a "Third University". I.
 1. Note on Sir John Fortescue.
 2. Extracts from Sir John Fortescue, *De Laudibus Legum Anglie, In Praise of the laws of England* (ed. S.B. Chrimes).
 3. Note on Sir John Spelman's *Reports*.
 4. Extracts from Introduction by J.H. Baker to *The Reports of Sir John Spelman* Vol II Selden Society 1978.

IX. The Typical Literature of the Common Law.

The typical literature of the common law system is the law report, together with forms of literature, such as abridgements of cases, which are parasitic on the law report. In this section we shall be looking at the history of the law report, and in particular at:

- a) the evolution in the form of law reports.
 - b) the function of law reports and their use in legal argument.
 - c) the loose nature of the conventions of legal argument.
 - d) the study of law reports.
1. Note by AWB Simpson on law reports.
 2. Preface to the *Commentaries or Reports* of Edmund Plowden (1578).
 3. Prefaces by Sir Edward Coke to Volumes I and III of his *Reports*.
 4. Extracts from C. K. Allen, *Law in the Making* (Oxford 1927).
 5. Extracts from J. P. Dawson, *The Oracles of the Law* (Ann Arbor 1968).
 6. The Study of Cases from AWB Simpson, *Leading Cases in the Common Law* (Oxford 1995).

X. Theorizing About the Common Law: 15th to 17th Century and Beyond.

In this section we shall consider the medieval and early modern theories of the nature of common law adjudication, noting the fact that very few common lawyers have ever devoted much attention to theorizing about the common law system. In particular we shall look at:

- a) iconoclastic theories of judicial decision.
 - b) the belief in the grounds or fundamentals of the law.
 - c) the relationship between legal theory and legal literature.
 - d) the pragmatism of Sir Mathew Hale.
1. Note on Sir Mathew Hale.
 2. Extracts from Sir Mathew Hale's *The History of the Common Law of England* (1713)

3. Article by AWB Simpson "The Rise and Fall of the Legal Treatise" *U Chicago LR* 48:632-679.
4. Article by AWB Simpson "Legal Iconoclasts and Legal Ideals" *U Cincinnati LR* 58:819

XI. Blackstone and Bentham.

In this section we shall look at Blackstone's attempt to provide a general theory of the nature of the common law. We shall also look, but only very briefly, and Bentham's contemptuous attack on Blackstone, on which there is more material in XIV 3 below. In particular we shall be concerned with the following matters.

- a) Blackstone's attempt to explain the relationship between judicial decision and the ideal of the rule of law.
- b) Blackstone's supposed "declaratory theory of precedent".
- c) Blackstone's explanation of the function of law reports.
- d) Blackstone and the wisdom of the past.
- e) Lobban's explanation of the nature of the common law tradition.

1. Note on Sir William Blackstone.
2. Extracts from D.J. Boorstin, *The Mysterious Science of the Law* (Cambridge 1941)
3. Extracts from W. Blackstone, *Commentaries on the Laws of England* (London, 1765-9).
4. Extracts from M. Lobban, *The Common Law and English Jurisprudence* (Oxford, 1991).
5. Note on Jeremy Bentham and "Dog Law".

XII. The Classical Common Law.

In this section we shall explore the idea that there was once a classical period of the

common law, and idea which is to be found in various writers. We shall be particularly concerned with the following issues.

- a) the elaboration of legal doctrine in the 19th century.
 - b) the idea of a classical law of contract.
 - c) the notion of a succession of ages of the law.
 - d) Kennedy's conception of a special mode of legal thought.
1. Note on the Conception of a Classical Common Law.
 2. A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" from *Legal Theory and Legal History* (London, 1987).
 3. Extracts from G. Gilmore, *The Death of Contract* (Ohio, 1995).
 4. Extracts from G. Gilmore, *The Ages of American Law* (Yale, 1977).
 5. Extracts from D. Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, 2006).

XIII The Jurisprudence of the 19th and early 20th Centuries.

In this section we shall look at theorizing about the nature of law and of the legal adjudication in the common law system which was associated with the teaching of law as an academic subject in university law schools.

1. Note on Sir William Markby.
2. Extracts from W. Markby's *Elements of Law* (Oxford 1874).
3. A.W.B. Simpson., Lecture on Sir John Salmond.
4. Extracts from J.W. Salmond, *Jurisprudence or The Theory of Law* (1907) and from *The First Principles of Jurisprudence* (1893)
5. Extracts from J. C. Gray, *The Nature and Sources of Law* (1909)*
6. O.W. Holmes, "The Path of the Law" 10 HLR 457 (1897).

7. R. Pound "Mechanical Jurisprudence" 8 Col.L.R. (1908) 605*
8. R. Pound, "The Call for a Realist Jurisprudence" 44 HLR 697 (1931)*.

XIV. Hart and His Critics.

1. Note by A.W.B. Simpson on Hart.
2. "Herbert Hart Elucidated", Book Review by A.W.B.S. of N. Lacey, *A Life of H.L.A. Hart: the Nightmare and the Noble Dream* in 104 Mich..L.R. 1437 (2006).
3. Extracts from H.L.A. Hart, *The Concept of Law* (1961) and from the Postscript.
4. A.W.B. Simpson, "The Common Law and Legal Theory" from *Legal Theory and Legal History* (London, 1987).
5. Extract from R. Dworkin, *Taking Rights Seriously* (1978).
6. Extract from R. Dworkin, *Law's Empire* (1986).
7. Extract from M. Arnheim, *Principles of the Common Law* (London, 2004).
8. Extracts from D.J. Galligan, *Law in Modern Society* (Oxford, 2007).

The World of the Blood Feud and the Rise of the Communal Courts.

The common law system is generally agreed by historians to have taken on a distinctive form and character in the reign of Henry II (1154-1189), some considerable time after the Norman Conquest of England in 1066. In this section however we look briefly at the very early history of Royal Law in England, back in Anglo-Saxon England, at a time when there was no such thing even as a single realm of England. Modern scholarship has suggested that in fact there may well be more legal continuity between the legal arrangements in Anglo-Saxon England and those in post-conquest England, so that, for example, such features as the use of juries and the use of writs can be traced back before 1066. But in this course we cannot go into such matters. It is nevertheless important to pay some brief attention to this point of view.

After the Romans Legions left in the fifth century England was colonized by invaders from Scandinavia and northern Germany, who brought with them their own customs and practices. But we know virtually nothing about the legal arrangements which operated in England until we reach the early seventh century, when we have an extraordinary document, a text of The Laws of Ethelbert of Kent, which date from about 602 or 603. These laws were promulgated in a world in which the basic mechanism for dealing with wrongdoing from outside the kinship group was the blood feud. This has existed in many societies which comprise a number of clans or tribes, and which lack a powerful centralized government. At the present day the blood feud is alive and well in some parts of Albania and Kosovo, and there is a novel by the celebrated Albanian novelist Ismail Kadare, *Broken April*, which tells the story of a feud, which is conducted according to customs set out in the 15th century *Kanun of Lek*. In fairly recent formalizes the feud was also practiced in some parts of Greece, in Cyprus, in Montenegro, Sardinia and in the Arabian peninsular. The feud is not however found in the early history of all societies. To our modern way of thinking the institution of the feud seems the very antithesis of

law, but in early societies it may not have worked too badly as a mechanism for procuring a tolerable state of order, and wherever the feud exists it is regulated by customs of one kind and another. It is also possible to avoid the feud or bring it to an end by some form of composition, or by the arbitration of friends and intermediaries, or by thrashing out some solution to the dispute before an assembly or gathering of important and powerful people, out of which evolves the idea of a court of adjudication. As reference to some kind of court of adjudication becomes more normal we can see the society developing into one which is ruled by law as we understand it. If you are interested in the institution of the feud good books to read are C. Boehm, *Blood Revenge: the Anthropology of Feuding in Montenegro and other Tribal Societies* (1984) and W. I. Miller, *Blood-taking and Peacemaking: Feud, Law and Society in Saga Iceland* (1990). In England the feud was to some degree regulated from the seventh century onwards, and in Post Conquest England evolved into a formalised legal procedure called an Appeal (meaning an accusation) of Felony or of Treason, which could however still lead to battle between accuser and accused. In due course the feud as a mechanism for dealing with wrong doing came to be superseded by the evolution of regular systems of adjudication in the form criminal trials on indictment, and by tort actions, and land disputes which could generate something like private war came to be superseded by regularized adjudication. As the Royal common law became more organized and powerful the blood feud thus passed into history.

In the Laws of Ethelbert we can see the germs of some of the ideas which were to make this development possible: the notion that the King had some special responsibility for law, the embryonic notion that some wrongs did not simply concern the two kin groups, but also the monarch, and the idea that some substitute for the feud was desirable. The Laws of Ethelbert also provide the first evidence of the use of writing in legal affairs, and we shall later see how this association between writing and law was to be of considerable importance in the early common law. You will notice that the Laws of Ethelbert do not deal at all with disputes over rights in land

as such, though they do so indirectly in dealing with the violence with which such disputes could well be accompanied.

In Anglo-Saxon England there were gatherings of important and powerful people who performed what we would think of as legal functions — perhaps some such gathering was involved in the promulgation of the Laws of Ethelbert. Back at this time there existed no conceptual distinction between law making and law applying. One such function was the resolution of disputes, so such bodies were embryonic courts of law. The gathering of such persons around the King, the Royal Council, was called the Witangemot, and there were other such gatherings or meetings at other levels in Anglo-Saxon society. We know very little about them because they did not keep any sort of written record of their proceedings. Bodies of this sort continued to operate in post-Conquest England and are called communal courts, the idea being that they in some sense represent the community, and apply the customary law of the community, law that as it were comes up from the community and not down from a King or Lord. In Anglo-Saxon England important ecclesiastics such as Bishops would attend the Royal Witangemot, so there was no separation between secular adjudication and ecclesiastical adjudication. And so far as we know within those who attended such "courts" there were no class of persons viewed as specialists in legal matters, though perhaps some individuals were deferred to on account of their reputation for wisdom. Furthermore the procedures they followed were unstructured, so that everyone who is there can chip in and make their contribution in the hope that after a lot of talking and arguing some sort of tolerable solution is evolved. All this is very unlike the common law system which we meet in the time of Henry II.

A New Kind of Law.

It was during the reign of Henry II (1154-1189) that the Royal common law takes on a recognizable form as a new kind of law, and an official in the Royal entourage was able to write an account of this new kind of law and the way it worked in the *Treatise* known as Glanvill. There has developed a regular practice of adjudication on disputes in the King's entourage or court, and litigation is managed by literate officials who are becoming specialists in this activity; they sit as justices, conceived of as deputies to the monarch. The rules and procedures and practices they follow constitutes the Royal common law, common because it is generally available throughout the realm. Some do this work in London or wherever the King happens to be, and others travel about the country so as to make the new kind of law ubiquitous. The principal function of these justices is to manage the very formal procedures which are used to get people to court, and bring the dispute to the point of decision. When that point is reached the normal way in which the matter is decided is by procedures which involve the Deity — in civil disputes typically battle (in which God will ensure the right person prevails) or in criminal cases the ordeal, which directly involved the Church since a priest was essential to the administration of the ordeal.

Some of the typical institutions of the common law system are already visible — professional judges at the centre of the system, acting as delegates of the monarch, the use of writs to initiate proceedings and take further procedural steps needed in the course of litigation, and the beginnings of the use of juries to adjudicate in civil cases. And we can see how the law of which "Glanvill" gives an account emerges out of the practice of adjudication, and this will remain as a basic feature of the common law system. We can also see the beginning of the

expansion in the scope of the common law, as new and better legal procedures, such as the Assize of Novel Disseisin, and the option of trial in land disputes by a jury known as the Grand Assize, are being invented. In criminal cases we also meet with the use of juries, but here they are used to accuse persons of crime and not to try their guilt or innocence. Another basic feature of the common law is there but is not so obvious in the materials — the law of which "Glanvill" gives an account is secular, and is administered by institutions which are quite distinct from the courts of the Church. You may notice in the passage from "Glanvill" the absence of any reference to the Church or to the Deity.

The Rival System: The Rediscovery of Roman Law

In this section we deal very briefly with the other major legal tradition developed in Western Europe, the Civil Law System. I have provided in the materials a draft of part of a book I am writing and some other materials. We cannot in this course look in any serious way at the characteristics of modern day civilian systems of law. But as you will all know a civil law system exists in Quebec, and in very many countries in the world civil law based systems are in force. Some countries indeed have deliberately chosen to import such systems. The spread of the common law tradition around the world has not been based on a choice to import it as being a good system. Instead it has spread around the world as a consequence of colonial expansion, and exists today in some countries where indigenous system of law were not respected at all (such as Australia) and in others where it co-exists with indigenous systems, as for example in Ghana or in India. Elaborate legal doctrines were evolved about this “reception” of the common law, though it is not usual to use this term to describe the process. For example in territories acquired by settlement the settlers took with them so much of the common law as was “appropriate to their condition”, so there are cases dealing for example whether the blessings of the rule against perpetuities was “appropriate.” In this course we do not go into such matters.

Note on Writs and Forms of Action.

Writs that began (originated) an action were called original writs. You obtained a writ from the Royal Chancery, and for this you might have to pay a considerable fee. Writs were issued on small pieces of vellum and authenticated by a sealing; they were then rolled up and so despatched. Sometimes actions could be begun by a less formal document known as a bill, but you can forget this complication.

In the course of the litigation there might be an occasion to issue another writ; such writs were issued by the judges and were called judicial writs. Then there were writs issued to implement a judgement. Writs, which are essentially letters, were also used for all sorts of other purposes. For example there was a writ called the writ *de ideoto inquirendo* which set in hand an examination of a person thought to be mentally deficient and unable to manage his affairs. Another writ provided for the burning of a heretic, the writ *de heretico comburendo*. This authorised the burning of a heretic condemned by the church courts, since the church got the secular authorities to do its dirty work.

If you look at the extract from Glanvill (II 2) you will see that the first writ he gives you, which is called the writ *praecipe in capite*, says that a complaint has been made to the King about someone's land, and it then orders the defendant to had the land back. Only if he does not do this is there to be litigation. If you look at the next original writ in the extract, the writ of *novel disseisin* (recent dispossession) you will see that its form is quite different, and it at once summons the defendant to court. Also note how each original writ starts a distinct form of litigation with its own procedures. Thus in the case of the *praecipe in capite* trial is by battle, with an option of jury trial; in *novel disseisin* its always a form of jury trial. These litigation

forms are called forms of action, and each form of action had attached to it its own procedural and substantive rules. Thus in the writ used for claiming debts, the writ of debt, trial of the issue was, unless the creditor had formal proof as by a deed, oath swearing, not jury trial. If the defendant swore an oath that he owed nothing, and could produce eleven other people prepared to swear that his oath was credible then he won.

Writs which were invented later tend to follow a different form in that they at once summon the defendant to appear “to who why” (*ostenturus quare*) something bad has, it is alleged, been done. An example is a trespass writ:

The King to the Sheriff Greetings. If [the plaintiff] shall give you security for prosecuting his clam then [take steps to ensure] that [the defendant] be before us on the octave of Easter wherever we are in England to show why [ostenturus quare} with force and arms he made assault of the said [plaintiff] and beat and ill treated and wounded him so that his life was despaired of and offered other outrages to him, to the grave damage of [the plaintiff] and against our peace] ...

This was the form for trespass to the person; there were forms for trespass to land and to goods. Such writ is stereotyped, so that one size fits all; this form would be used for a slap in the face, or for cutting off an arm. So until the plaintiff came to court and told his tale you did not have much idea as to the facts alleged. In the 14th century writs “on the case” (also called “trespass on the case”) were evolved, in which the writ was varied to meet the special circumstances of the case; hence their name. Such writs were not stereotyped, and the special circumstances were set out in the writ in a clause beginning “whereas” (*cum*) as in this example:

The King to the Sheriff [etc as above] to show why (*ostenturus quare*) whereas (*cum*) the

[plaintiff] delivered a certain horse to the said [defendant] to be well and sufficiently shod, the sam [defendant] fixed a certain nail into the living part of the hoof of the aforesaid horse [OUCH!] in such a way that the horse was in many ways impaired to the dame of the [plaintiff] one hundred shillings as he says...

Such writs were much more fact specific. Most of our modern law of tort and contract was evolved around actions of trespass and actions of trespass on the case.

In the Chancery there was a hierarchical bureaucracy of clerks, and in the period up to about 1350 (though this is controversial) it seems as if it was the senior clerks, under no doubt the superintendence of the Chancellor, who devised and approved new writ forms, and who thus controlled the expansion of the common law. As the range of writs which were issued increased the scop of the common law expanded to cover a wider category of claims. New writ forms were also sued as a mechanism for law reform — if an old established form of action came to be thought unsatisfactory newer forms of action with better procedures could be used. Thus the old forms of action used to assert claims to land, called the Real Actions, came to be superseded by a variant form of the action of trespass, called the Action of Ejectment. This, for example, used jury trial whereas some of the old Real Actions involved a risk of trial by battle.

After about 1350 the Chancery seems to have merely issued established writs and rubber stamped new forms, often actions on the case, devised by plaintiffs' lawyers. Whether a new form would fly was controlled by the common law judges, for there were procedures whereby objection could be taken to a writ when the case came to court. So the initiative in the expansion of the common law came to be in the hands of the judges. Chancery clerks involved in issuing of writs would relay on precedent books known as *Registers of Writs* — all were handwritten

because there was no printed version until 1531. There is no clear evidence that there ever existed a master *Register of Writs*, so that some variations in writ forms was possible, as different clerks would use different precedents from whatever *Register* they were using..

The forms of action were progressively abolished in the 19th century. Whilst they existed they were the foundation of the structure of the law. Even since they were abolished many of our legal categories, such as the concept of trespass, derived from them. One noted legal historian, Frederick Maitland, said, with some exaggeration, that although we have buried them they still rule us from the grave.

Note on Law and Fact.

Under the ancient Roman Law System procedures were evolved under which in litigation a distinction was made between matters of fact, which were decided by lay judges chosen by the parties to the litigation, and matters of law which were the preserve of the expert lawyers. In the common law system this distinction evolved and was made possible by the development of procedures which isolated matters to be decided by the judges with the assistance of expert counsel, and matters which were to be decided by lay jurymen. The earliest form of procedure which made this distinction possible was special pleading.

To understand this consider first consider general pleading, for example in a simple version of trial on indictment. The accused is charged say with murdering X he pleads Not Guilty. That is a general plea, and the case then goes to the jury which decides both what the person did and whether it counts as murder. The procedure does not require the jury in giving its verdict to make any distinction between these two questions. or take an action of trespass. The plaintiff says that the defendant violently assaulted him "with force or arms" and "against the peace". If the defendant pleads the general issue, "not guilty of the said trespass" then again the procedure does not separate issues of fact (what the defendant did) from issues of law (does that count as a trespass). Or to put it another way law and fact are all muddled up together.

Now take an example of a special plea. In the trespass case the defendant perhaps pleads "in confession and avoidance" — he concedes that he assaulted the plaintiff but says he was applying correction to his pupil. So he adds a new factual allegation. Now the plaintiff can respond in two ways. He can deny these new facts, and the jury can then decide the issue of fact — was the plaintiff his pupil and was he being corrected. Or the plaintiff can plead that even if this

is so there exists no right to assault a pupil by way of correction. This isolates a question of law for decision by the judges.

The system of pleading was hugely elaborated, but the essential were as follows. The aim of the system was to provide a mechanism whereby the parties had to agree as to what they were disagreeing about. The plaintiff starts by alleging the facts on which he bases his case. It's now the defendants move. He can deny all the facts generally — that's pleading the general issue. That's the end of the pleadings, called the issue (issue = exit). The case then goes to the jury.

Or he can plead specially.

He can deny one of the facts (called a special traverse). Then the plaintiff can respond in two basic ways. He can plead that even if this denial is true he is still entitled to recover. That raises an issue of law for the court. Such a plea is called a demurrer; the parties have agreed to differ on a matter of law. Or he can agree to differ on the denial of the fact in the special traverse. That raises a matter of fact for the jury. If he does this he joins issue on the special traverse.

Alternatively he can admit the facts but add new factual allegations which he thinks will exonerate him. That is called a plea in confession and avoidance. It's then the plaintiff's move — he can either deny the new facts, or put in a plea that does not dispute the new allegations but says that they don't exonerate the defendant. Issue can be joined either on the factual issue, to be decided by the jury, or the legal issue, to be decided by the court.

The process of pleading continued until a positive assertion was met by a direct denial. Once this happened the parties exited from the process of pleading — this was called joining issue. The process could be very complex, with plea and counter plea until issue was reached. Thus in response to a plea in confession and avoidance the plaintiff might reply by himself responding by another plea in confession and avoidance. Then it was the defendant's move again. But

eventually the parties would agree on what they were disagreeing about and it was either an issue of law for the court, or an issue of fact for the jury.

In time other procedural mechanisms were evolved for making this basic distinction between issue of law and issues of fact. Note however that the distinction does not exist in the nature of things; it's a distinction imposed on reality by legal procedures.

The Function of Lawyers and the Rise of Special Pleading.

The development of the common law system is intimately connected with the evolution of lawyers as a profession. Here Milsom is introducing the text of an early legal work, *Novae Narrationes*, which literally means “The New Stories;”, and explaining what court lawyers originally did when they were narrators — tellers of formalized stories. Law at this time consists mainly of formal procedures which you have to follow. there is little of what we call substantive law — law saying what peoples’ rights and duties and legal responsibilities are.

In time they turned into pleaders, and the case in 1348 illustrates the development of special pleading, which was one of the mechanisms which distinguished questions of law for the judges to decide from questions which were left to juries or to God. You can see how the procedure isolates a possible question of law — are you liable in trespass if you are engaged in applying medical treatment (i.e. a beating) to an insane person? The *Case of the Thorns* in 1466 shows a procedure which isolates a big theoretical issue of tort law — the case is used in Epstein’s modern case book. Here we can see a highly sophisticated group of lawyers and judges discussing the theory of legal liability. None of that when you have trial by battle or simple claim and denial.

The account of an early direction to a jury and the form of a civil trial is taken from Thayer’s *Preliminary Treatise on Evidence*. It describes a case tried the year before the *Case of the Thorns*. We have very few accounts of what actually went on in a civil case in the 15th century or earlier. By this time a certain amount of evidence was being presented by witnesses in court.

The Common Law Criminal Trial.

In this short course we can only look very briefly at the history of the criminal trial. Once the ordeals went the system of trial on indictment involved jury trial, but since this was an inferior system the accused had to consent to it. If he did not consent he was tortured until he did by what was called the *peine fort et dure*. He was pegged out on the ground in a prison and heavy weights were put on him until he consented. If he did not consent he died, but not as a convicted felon. So his property was not forfeit to the Crown.

Originally the jury was "self informing" — the jurymen came to court already knowing the answer. But by the close of the medieval period the practice had begun of evidence being submitted to jurors. Eventually the whole nature of jury trial changed — the jury was converted into a body which adjudicated on evidence, and the less they knew about the case before the trial the better. This development took place over a long period of time.

Throckmorton's Case, provided in the materials, is the first criminal trial of which we have something like a verbatim record. See how very different it is from a modern trial; some of the differences are mentioned in the passage given from Stephen's *History of the Criminal Law*. The account is a little misleading. This was a big political trial arising out of a rebellion, Wyatt's rebellion. It was not typical of your run of the mill trial at this period. In particular lawyers did not regularly feature in criminal trials until well into the eighteenth century. Lawyers do feature in big state trials from the 16th century onwards.

The materials give some account of the procedural system evolved in the reign of Queen Mary. Under this procedure the Justices of the Peace, unpaid local worthies, had the job of recording evidence against the accused in depositions, and then binding the accuser and witnesses to turn up at the trial. This produced a sort of dossier which could be used by the trial judge to manage the proceedings.

Trials in the late seventeenth and early eighteenth centuries did not follow the form of the

modern adversarial trial, in which each side has its opportunity to put forward a case, while the judge merely acts like a referee or umpire to make sure the rules of the game are followed.

Instead the judge was very much in charge of the proceedings, and he used the accuser and his witnesses and the accused as the basic resources. Lawyers hardly ever appeared, and the trial was over quite quickly; surprisingly however acquittal rates were fairly high.. The elaborate law of evidence had yet to be invented, as had the ordered structure of the proceedings. Advocacy was not a feature of the trial, since there were normally no advocates present.

The materials contain material from the writings in particular of John Langbein and David Beatty, who have revolutionized our understanding of the evolution of the criminal trial and the part the lawyers came to play in it.

The materials conclude with an account of the capital punishment process and one of the early nineteenth century trials. Although the law began with the notion that all serious crimes (felonies and treasons) merited the death penalty, there had evolved over the years a variety of mechanisms whereby only a small and declining number of criminals were actually executed. The high point for capital punishment was probably the 16th century, and if you look at large scale maps of England you will find many place names which recall the ubiquity of death by hanging — Gib Hill and names like that. Alternative forms of punishment were invented, most notably transportation, originally to America and later to Australia. In the nineteenth century England ran out of places in which to dump its criminals, and the prison or penitentiary was invented, and imprisonment became the typical sanction of the criminal law for serious crime. But until its final abolition in the 1960s the death penalty remained as the ultimate sanction of the law, and had a bizarre religious significance, which I illustrate for you with a short unpublished piece I wrote on the execution of Mary Ball in 1849. One of the last English executioners, Albert Pierrepoint, told a Royal Commission that he thought of execution by hanging as a sort of sacrament.

The Typical Literature of the Common Law: The Law Report.

The typical literature of the common law is surely the law report, and we have fragments of law reports from about 1250 and law reports proper from about 1290, mainly concerned with the Court of Common Pleas. The language used is Norman French, and what these reports record is things that were said in the course of litigation. Medieval law reports are called Year Books, since collections of them are arranged by regnal years. At the time they were sometimes called books of terms, since they were arranged in collections for individual law terms — Hilary, Michaelmas, Trinity and Paschal. Most of the medieval reports are anonymous in that we have no idea who compiled them. A story was told in the sixteenth century that they were compiled by four official reporters, but no confirmation of this story has ever been found. It is possible that they were produced, at least in the 15th century, in connection with educational exercises in the Inns of Chancery in which the teacher dictated the text to students and perhaps commented on them. Many manuscript Year Books have survived and in numerous instances we know the names of their owners, who seem to have acted as their own scribes. Lawyers in the 15th century and perhaps earlier may also have kept their own private note books of cases.

Once printing came in — the first book printed in England dates from 1477 — printed versions of the year Books were produced on a large scale, with one printer being given the monopoly of the right to publish the books of the Royal Law. The last printed collection appeared in 1678. Reports published in Year Book form do not include cases later than 1536.

In the 16th century it was a common practice for lawyers to compile their own collections of cases: some reported by themselves and some copied from other lawyer's reports. Large numbers of law reports circulated in manuscript form. Since many have names of authors

or compilers associated with them these are called "nominate reports'. In the 16th century a collection by Sir James Dyer, who had been Chief Justice of the Common Pleas, and earlier a Justice of the King's Bench, was printed after his death, in 1585. Also published in 1579 was a set of reports, called *Commentaries*, by Edmund Plowden (1518-1585), reputed the most learned lawyer of his time. He was loyal to the old religion and this prevented him from ever achieving judicial office under Elizabeth I. Plowden only reported cases actually determined on issues of law arising on the pleadings, as by demurrer, motion in arrest of judgement or special verdict. He invented the idea that it was only such cases which really contributed to the law. He included the text of the court record of the case which he reported, and provided elaborate texts of the arguments of counsel. The Preface to his reports is included in the materials. From 1600-1616 Sir Edward Coke published a series of reports, and the Preface to two volumes (one edited) is included in the materials. You may find that Coke does not make us much the wiser about the function of his reports, though he is keen to emphasise the antiquity of the law. Until the mid-seventeenth century some form of restrictive control over the publication of law reports was exercised by the judges, and publication of common law books was a monopoly. Under the Commonwealth the controls, whatever they were, ended, and numerous "nominate reports' with cases from the 16th and 17th centuries, appeared in print. They are of very varied quality.

The law reports are quite distinct from the record of the court, which was not a public document, and which merely recorded the formal steps in the litigation. The function of law reports was that they, by recording what was said in court, and in particular the arguments presented or deployed by the judges and counsel, provided a window into the reasoning behind the decisions formally recorded on the court record. From the record it was usually not possible to explain why a decision had been taken, and in any event the records were not public

documents. They were far too voluminous for lawyers to own copies. When a need was felt to consult them the clerks of the court were able to track down relevant cases, but no comprehensive index existed in medieval times.

From an early period the common lawyers attached importance to the practices and procedures established and followed in the past, and viewed decisions taken in the past as relevant to what should be done in the present. But the evolution of formal rules about the use of precedents is a fairly modern phenomenon.

The materials include writings by Sir Carleton Kemp Allen" *Law in the Making*. This book, which went into many editions, originated in a set of lectures delivered in Calcutta in 1926. Allen taught law in Oxford where he held the chair of jurisprudence for a short period; he then became Warden of Rhodes House. Other extracts come from the American scholar John Dawson's *The Oracles of the Law*. Dawson taught at Michigan and Harvard, and had studied legal history in Oxford as a young man. His discussion, though today somewhat overtaken by modern scholarship, has interesting things to say about the case law system.

A word needs to be said about the form of common law judicial opinions. Back in the 16th century and earlier the judges engaged in arguments with each other and with counsel in the course of a hearing. The process of argument was public. If a decision was given on a point of law they did not normally explain, after the event, the reasons why they had come to the decision. So you had to, as it were, guess the reasons from the arguments presented in the course of the hearing. Later in the 17th century it became more usual to provide an explanation after (or just before) the final decision had been given. These post decision explanations retained the argumentative and discursive style of speeches made before the decision was reached.

